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Nos. 85-792 and 85-793

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION,
Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION

On December 1, 1986, this Court issued an order inviting the parties to submit supplemental briefs on the following question:

In view of 28 U.S.C. Section 2344, 49 U.S.C. Section 10327(i), and the passage of more than 60 days between (1) respondents' appeals from the Interstate Commerce Commission's October 25, 1983, order, declining to reconsider its May 18, 1983, order regarding respondent Brotherhood of Locomotive Engineers' motion for clarification, and (2) service of the Commission's May 18, 1983, clarification order, did the appeals properly bring before the reviewing court the May 18, 1983, order?

This supplemental brief is respectfully submitted by respondent United Transportation Union [hereinafter, "UTU"] in support of its position that the court of appeals had jurisdiction to review both the May 18 and the October 25, 1983 orders.

SUPPLEMENTAL STATEMENT OF FACTS

Within twenty (20) days after the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] served its decision on May 18, 1983, denying the petition of the Brotherhood of Locomotive Engineers to clarify the 1982 merger order, respondents UTU and Brotherhood of Locomotive Engineers [hereinafter, "BLE"] filed petitions with the ICC to reconsider that decision.[1] Those petitions were filed under 49 U.S.C. § 10327(g)(1) and were timely under the Commission's rules pertaining to "discretionary appeals." *See* 49 C.F.R. § 1115.3(e) (1983).[2] On October 25, 1983, the

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[1] Respondent BLE's Petition was filed on May 31, 1983, and the UTU's petition was filed on June 7, 1983.

[2] In November 1982, the ICC redesignated and revised its Rules of Practice to use the current designations. Prior to that revision, Rule 98 of the Commission's Rules of Practice, which was first added in 1977 by *Ex Parte No. 55 (Sub-No. 24)*, served May 2, 1977, and Rule 99 implemented Section 303(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 48, to provide for petitions for discretionary review of ICC decisions; such petitions were to be filed within 20

ICC served its decision in this proceeding, denying the BLE's and UTU's separate petitions for reconsideration. Respondent BLE thereafter filed a petition with the United States Court of Appeals for the District of Columbia Circuit on December 16, 1983, to review both the May 18 and October 25, 1983 decisions. Respondent UTU filed a separate petition with that court of appeals on December 23, 1983, to review the October 25, 1983 decision under 28 U.S.C. §§ 2321(a) and 2341, *et seq.*; respondent UTU did not petition to review the May 18, 1983 decision because, unlike the BLE, it had not participated in the initial petition to clarify which was denied by the May 18th order.

ARGUMENT

I. This Court Has Jurisdiction To Review The Merits Of The May 1983 Decision Since The Timely Petitions For Reconsideration Tolled The Time In Which Respondents Were Required By 28 U.S.C. § 2344 To Invoke The Jurisdiction Of The Courts Of Appeals.

Respondent UTU has reviewed the Supplemental Brief for respondent BLE on this question, and since respondent UTU agrees with the BLE's argument, respondent UTU hereby adopts those arguments. This brief is respectfully submitted by respondent UTU to set forth both the legislative history of what is now 49 U.S.C. § 10327 (i) and additional reasons why respondent UTU asserts that the petitions for reconsideration tolled the time in which the petitions for review were to be filed.

28 U.S.C. § 2344 provides in pertinent part that: "Any party aggrieved by the final order [reviewable under this chapter] may, within 60 days after its entry,

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days after service of the ICC devision for which review was being sought, with a possible extension of 20 days. *See*, Rule 98(c), ICC Rules of Practice (1977). The 30 day period for such discretionary reviews has been continued by each successive ICC revision of its rules. *See, Ex Parte No. 55 (Sub-No. 24A)*, served June 29, 1979 (Rule 98(e)); 49 C.F.R. § 1115.3(e) (1985).

file a petition to review the order in the court of appeals wherein venue lies." That provision, the courts of appeals have consistently noted, is jurisdictional and may not be enlarged by a court of appeals. *E.g., Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 389 (D.C. Cir. 1974); Rule 26(b), Fed. R. App. P. (". . . court [may not] enlarge the time prescribed by law for filing a petition to set . . . aside . . . an order of an administrative agency . . ., except as specifically authorized by law"). However, notwithstanding a literal reading of Section 2344 and similar jurisdictional provisions, it is well accepted that a timely request for discretionary agency review tolls the time in which a party may seek court review of the agency order until the agency issues its ruling on the request for reconsideration. *E.g., Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs*, 798 F.2d 215, 218-19 (7th Cir. 1986); *Outland v. CAB*, 284 F.2d 224, 226-28 (1960).

This construction of jurisdictional provisions for review of agency orders is analogous to similar interpretations of the time in which appeals may be taken from orders of lower federal courts to appellate courts when requests for reconsideration have been filed. *Accord, Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942); *see also*, Rule 4(a)(4), Fed. R. App. P. (clarifying effect of premature notice of appeal). Moreover, the *Outland* view of the tolling effect of a timely petition for discretionary agency review was the accepted state of the law when Congress, by Pub. L. No. 93-584, 88 Stat. 1917 (1975), made ICC orders subject to review under the existing Hobbs Administrative Review Act, 28 U.S.C. § 2341, *et seq. See, Outland v. CAB, supra*, 284 F.2d at 227 (non-Hobbs Act case).

In this case, however, a question has been raised as to the application of the *Outland* tolling principle, because 49 U.S.C. § 10327(i) specifically provides for rail cases before the ICC that:

> Notwithstanding this subtitle [*i.e.*, Interstate Commerce Act], an action of the Commission under this section and an action of a designated division under subsection (c) of this section [voiding requirement of initial decision] is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

Respondent UTU respectfully submits that Section 10327 (i) was not intended to, and does not, change the fact that a timely petition for discretionary agency reconsideration tolls the time that an aggrieved party may invoke the jurisdiction of court of appeals under 28 U.S.C. § 2344. *E.g.*, *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 672, *en banc*, 735 F.2d 1059, 1061 (8th Cir. 1984).

Section 10327(i)'s predecessor[3] was added to the Interstate Commerce Act [hereinafter, "ICA"] in 1976 when Congress amended Section 17(9) of ICA by Section 303(a) of the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, 48-50. Section 303(a) of the 4R Act was devised primarily from the House version of the bill, but included two provisions from the Senate version, one of which was to allow the Commission to hear a matter initially rather than having that matter proceed through the normal appellate process, and the other was to require all ICC proceedings to be concluded with administrative finality within 3 years after such proceeding began. Conference Report on S.2718, H. Rpt. No. 94-781, 94th Cong., 2d Sess. at 159-62 (1976). Section 10327(i)'s predecessor was not included in the House version of the bill (*see*, 121 Cong. Rec. 41404, 41407 (December 17, 1975)), but was a part of the Senate

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[3] In 1978, Congress recodified the Interstate Commerce Act as 49 U.S.C. § 10101, *et seq.* Pub. L. No. 95-473, 92 Stat. 1337 (1978). That recodification was intended to be without substantive change. Pub. L. No. 95-473 at § 3, 92 Stat. at 1466. Former Section 17(9) of the Act, as added in 1976, became 49 U.S.C. § 10327(i).

version. *See*, S. Rpt. No. 94-499, 94th Cong., 1st Sess. at 60-61 (1975). While the Conference Report and debates are silent on why Section 10327(i)'s predecessor was included in the final bill, the reason for its inclusion may be seen from an examination of Section 303(a)'s stated intent.

Both the House[4] and Senate reports show that Section 303(a) had two purposes. First, the bill was intended to revise the ICC's procedures under which the ICC handled rail cases to reduce unnecessary "regulatory lag." H. Rpt. No. 94-725, *supra* note 4 at 61. As the House Report noted, many of the Commission's rail procedures:

> [W]ere developed in a historical time period quite different from today. Moreover, with most Federal agencies following up-to-date rules of practice the Commission should be given the opportunity to benefit from their experience and establish comprehensive but effective rules of practice suitable for 1975 and the future.

H. Rpt. No. 94-725, *supra* note 4 at 60. The Senate's version of the bill was guided by similar considerations, for after noting that the ICC's rail procedures, with one exception, dated from 1940, the Senate Report stated:

> Since 1940, administrative proceedings have grown increasingly complex. In 1947, the Administrative Procedure Act was enacted and now controls the procedures of most government agencies. However, section 17 [of the ICA] continues to govern ICC procedures, and since its requirements are in several respects considerably more extensive than those contained in the APA, section 17 in its present form has contributed substantially to unnecessary regulatory lag.

S. Rpt. No. 94-499, *supra* at 60. Both bills sought to correct these deficiencies by streamlining the ICC's internal review procedures and by establishing deadlines

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[4] H. Rpt. No. 94-725, 94th Cong., 1st Sess. (1975).

by which the agency had to complete its proceedings. *E.g.*, H. Rpt. No. 94-725 at 61; S. Rpt. No. 94-499 at 61-62.

A second problem which both versions of the bill addressed was the inability of the Commission under pre-1976 law to make its non-money orders effective immediately. S. Rpt. No. 94-499 at 60. Both versions of the bills corrected this problem by allowing the Commission to make an order effective on less than 30 days notice. *See*, H. Rpt. No. 94-725 at 163.

Section 10327(i)'s predecessor, respondent UTU respectfully submits, is part of, and, indeed, a necessary feature of Congress' response to both problems. Prior to 1976, Section 17(9) of the ICA provided that when an application for reconsideration of any decision, order or requirement of a division, an individual Commissioner, or a board had been made and had been decided, a suit to enjoin or set aside the agency action "may" be brought at that time, "but not otherwise." 49 U.S.C. § 17(9) (1974). That requirement had been construed by the courts as requiring a party to utilize such internal review procedures *before* seeking judicial review of the ICC's order. *Holmes v. United States*, 89 F.Supp. 894, 896 (S.D.N.Y. 1949) (3 Judge Court), *aff'd per curiam*, 339 U.S. 927 (1950); *see also*, *Teamsters Joint Council 40 v. United States*, 238 F.Supp. 301 (W.D. Pa. 1965) (3 Judge Court). Such a rigid "exhaustion of administrative remedies" requirement was inconsistent with Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704 (1986), which provides in pertinent part that:

> Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for . . . any form of reconsideration . . . .

Since Section 303(a) of the 4R Act was intended to streamline the ICC's internal procedures and to allow it

to make its orders effective on short notice, even though its decision was pending further agency reconsideration, it was necessary to give parties aggrieved by the ICC's order an option to seek immediate judicial review without being subjected to a defense of failing to exhaust administrative remedies. Section 10327(i) accomplishes that objective. However, Congress chose to give aggrieved parties a second option, and that was to seek discretionary review by the ICC itself. Since Section 303(a) of the 4R Act, especially as construed by the ICC in its regulations (*see* note 2, *supra*), gave aggrieved parties the option of seeking discretionary agency review of a decision which affects them (*see* 49 U.S.C. § 10327(g)(1)), the necessary conclusion which follows is that Congress did not intend to preclude subsequent judicial review when it provided for discretionary agency review. Surely, a discretionary review procedure which cuts off judicial review would be a meaningless remedy, rarely, if ever, used.

Viewing Section 10327(i) and Section 2344 as precluding judicial review of the underlying agency action after denial of a timely petition for the discretionary agency review, respondent UTU submits, would run counter to the consistent line of cases interpreting similar jurisdictional provisions, including the Administrative Procedure Act on which Congress asserted it was modeling its revisions to the ICC's procedures. *E.g., Outland v. CAB*, *supra*, 284 F.2d at 227 (construing Section 10(c) of the APA, now 5 U.S.C. § 704). On the other hand, viewing a timely request for discretionary agency reconsideration as tolling the time period in which to seek judicial review, will foster the Administrative Procedure Act's and modern jurisdictional provisions' policy of allowing an agency to reconsider and to reflect upon its decision before the federal courts are involved. *Compare, Cartersville Elevator, Inc. v. ICC, supra, and B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1114-15 (8th Cir. 1977), *with, Provisioners Frozen Express, Inc. v. ICC*, 536 F.2d 1303 (9th Cir.

1976) (untimely petition does not toll time to seek judicial review). Moreover, such a view of the effect of a timely request for discretionary review is consistent with the federal courts' longstanding view that a timely motion to reconsider tolls the time for taking an appeal. *E.g.*, *Pfister v. Northern Illinois Finance Corp.*, *supra*, 317 U.S. at 149-50. Surely, if Congress had intended in 1976 to change this longstanding view of the effect of seeking reconsideration in a timely fashion, it would have done so by language and with legislative history which clearly evidenced such an intent. Section 303(a) of the 4R Act does not even hint at such an intent.

CONCLUSION

Respondent UTU respectfully submits that the court of appeals had jurisdiction to review the merits of the May 1983 ICC order at issue in these cases.

Respectfully submitted,

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